No. 11514

In the United States Court of Appeals for the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., ET AL., INTERVENORS

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO), INTERVENOR

and

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLGATE-PALMOLIVE-PEET COMPANY, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition (R. I, 101–126)[1] of Colgate-Palmolive-Peet Company,

[1] "R" refers to the printed transcript of record. The roman numerals preceding the comma refer to the volume of the printed record in which the reference appears. The arabic numerals following the comma refer to the pages of the volume of the printed record in which the reference appears.

herein called the employer, to review and set aside an order issued by the Board against the employer on September 6, 1946, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq*).[2] In its answer to the petition, the Board has requested that its order be enforced (R. I, 134–142). The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act and the Act, as amended, the unfair labor practices having occurred at the employer's plant in Berkeley, California, within this judicial circuit.[3] On February 17, 1947, pursuant to their respective requests (R. I, 144–150, 151–155), this Court entered an order permitting the intervention in this proceeding of International Longshoremen's and Warehousemen's Union, Warehouse Union No. 6, C. I. O. herein called the C. I. O., International Chemical Workers Union, A. F. of L., herein called the A. F. L., and named individuals whom the Board's order requires the employer

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[2] The National Labor Relations Act, herein called the Act, was amended by Section 101 of Title I of the Labor Management Relations Act, 1947, effective August 22, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*). Section 101 of Title I is herein called the Act, as amended (Sec. 17, the Act, as amended). Relevant portions of the Act and the Act, as amended, appear in the Appendix, *infra*, pp. 68–76.

[3] The employer, a Delaware corporation, operates numerous plants throughout the United States, including its plant at Berkeley, California, where it manufactures and sells soap and glycerin. The employer's operations entail substantial purchases and sales in interstate commerce (R. I. 177, 5, 10). As the employer concedes (Br., p. 23), no jurisdictional issue is presented.

to reinstate with back pay (R. I, 143–144).[4] The Board's decision and order (R. I, 68–85) are reported in 70 N. L. R. B. 1202.

STATEMENT OF THE CASE

I. The Board's findings of fact

The facts in this case relate to the employer's discriminatory discharge of and refusal to reinstate thirty-seven named employees in violation of Section 8 (1) and (3) of the Act. The illegality of the employer's conduct lies in its discharge of and refusal to reinstate the employees pursuant to a closed-shop contract, when, to the employer's knowledge, the contracting union requested the discharges under the contract because the employees engaged in rival union activities during a period when it was appropriate for the employees to seek a change of bargaining representatives. The Board's decision rests upon the rationale expressed by it in *Matter of Rutland Court Owners*[5] which was approved by this Court in *Local No. 2880* v. *N. L. R. B.*[6]

The thirty-seven named employees comprise three groups of employees who may for the sake of con-

[4] In its brief (pp. 21–22), the employer renews its objection, previously made in its answer to the request for intervention (R. I, 159–160), to the intervention of the A. F. L. and the named individuals. Permissive intervention is a matter within the Court's sound discretion. The Board does not oppose the intervention of the A. F. L. and the named individuals and believes it to be appropriate in view of the permitted and unopposed intervention of the C. I. O.

[5] 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

[6] 158 F. 2d 365 (C. C. A. 9), cert. granted, 331 U. S. 798, cert. dismissed on motion of petitioner, 332 U. S. 845.

venience be designated as (1) the five C. I. O. stewards, (2) the four Employees Welfare Association committeemen, and (3) the twenty-eight additional employees. The five stewards, as the elected representatives of the plant employees at the employer's plant in Berkeley, California, were responsible for the day-to-day administration of a closed-shop agreement to which the C. I. O. was a party, and spearheaded a movement to oust the C. I. O. as bargaining representative. The four committeemen were plant employees who played a prominent role in the rival movement, and who were the elected officers of the Employees Welfare Association, an interim organization formed to oppose the C. I. O. The twenty-eight additional employees were active participants in the campaign to depose the C. I. O. and to establish the A. F. L. as bargaining representative. The Board determined that as a matter of law the closed-shop contract did not preclude the employees in question from engaging in rival union activity at the time they did so and found as ultimate facts (1) that the C. I. O. sought to use the closed-shop contract for the purpose of punishing the employees for engaging in such rival union activities, and (2) that, although the employer had knowledge that the C. I. O. had suspended the employees from membership because of their rival union activities, the employer acceded to the request of the C. I. O. that the employees be discharged under the closed-shop contract. The pertinent facts, as

found by the Board and as shown by the evidence, may be summarized as follows:[7]

A. The closed-shop agreement between the employer and the C. I. O.

On July 9, 1941, the employer and the C. I. O. entered into a contract covering the production and maintenance employees at the Berkeley plant, embracing the usual terms of a collective agreement, and providing that it was to "remain in effect unless and until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representatives" (R. I, 69, 23–25; R. III, 788). Section 3 of the agreement embodied a typical closed-shop provision requiring that new employees be hired through the offices of the C. I. O., or in the event that the C. I. O. was "unable to furnish competent workers" that new employees apply for membership in the C. I. O. within fifteen days of their employment, and further requiring as a condition of employment that employees "be members in good standing" of the C. I. O. (R. I, 69, 24; R. III, 787–788, R. I, 223). On July 24, 1945, a supplemental agreement was entered into which extended the 1941 contract by providing that that contract should "remain in full force and effect" pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes (R. I, 69, 25; R. III, 788–789, R. I, 223).

Local 6 of the International Longshoremen's and Warehousemen's Union admitted to membership em-

[7] Where, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings, succeeding references are to the supporting evidence.

ployees of other employers (R. I, 26, n. 5; R. I, 187). None of its officers were employees of the Colgate–Palmolive-Peet Company and the contract with that Company was administered by five plant stewards who were employees (R. I, 218–220, 286). In July 1945 the five C. I. O. plant stewards were Haynes, Luchsinger, Marshall, Moreau and Smith (R. I, 26; R. I, 193).

B. The employees' dissatisfaction with the C. I. O. and the preliminary steps taken by them to change representatives

Dissatisfaction with the representation accorded them by the C. I. O. had been brewing among the employees for about six months before the extension of the closed-shop agreement (R. I, 25; R. I, 225–226, 209). During this period, the five plant stewards, elected by the employees to handle the day to day administration of the agreement (R. I, 218–220, 286), expressed their discontent with the C. I. O. officials to Charles Wood, the employer's Labor Relations Director (R. III, 758–759). On July 20, 1945, four days before the execution of the extension of the collective agreement, Steward Marshall in a conversation with B. W. Railey, the employer's vice-president (R. I, 181), asked that the five stewards be present when the extension was signed because of impending labor troubles at the plant due to the employees' unrest (R. I, 188–189, 225–226).

Some time in July, the five C. I. O. stewards contacted District 50 of the United Mine Workers of America and discussed with its representatives the possibility of transferring the affiliation of the Com-

pany's employees to that organization (R. I, 25–26; 190, 209, 237–240). On July 26, 1945, the five C. I. O. stewards for the purpose of organizing employee sentiment into effective action in opposition to the C. I. O., arranged a dinner attended by the five stewards and some twenty-four additional employees (R. I, 26; R. I, 189–191, 208–210, 255). At this dinner those present decided to call an open meeting on July 30, 1945, for the employees at large, to discuss a change in bargaining representatives to be undertaken initially by the formation of a temporary organization known as the Employees Welfare Association (R. I, 26; R. I, 189–191, 208–210, 255). On July 28, 1945, a "notice of meeting" was posted on the bulletin boards throughout the plant inviting "all those interested in joining Employees Welfare Association" to be present at a neighboring meeting hall "at 4:15 p. m., Monday, July 30, 1945" (R. I, 69, 27; R. I, 191–192, 255–256). On the same day, Superintendent Altman knew of the posting and, upon receiving a telephone call from Labor Relations Director Wood asking "if anything unusual had happened," told him of the notice (R. III, 667–668, R. I, 255–256). Thereafter Steward Luchsinger and employee Olsen visited Superintendent Altman at his office, and obtained Altman's agreement to shut down the plant for two hours so that the night shift employees could attend the meeting (R. I, 69–70, 2; R. I, 268–269). The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting (R. I, 69–70, 77).

C. The employer, knowing the C. I. O.'s discriminatory purpose, accedes to the C. I. O.'s request to discharge the stewards and the committeemen for their leadership of the rival union activities

On July 30, 1945, the same day for which the rival organizational meeting was scheduled, the C. I. O. requested and obtained the discharge of the five stewards who were leading the employees' organizational efforts (R. I, 70, 29; R. III, 806–807, R. II, 654–656). In the early afternoon of that day, four C. I. O. officials, who were not employees of the Company, called upon Superintendent Altman at his office (R. I, 27; R. III, 667). The C. I. O. officials handed Superintendent Altman a letter which requested the discharge of the five duly-elected plant stewards, including Steward Luchsinger who had obtained Altman's agreement to shut down the plant. The letter stated "that charges have been preferred" against these employees "and that they have been suspended from membership" in the C. I. O. "pending a trial" (R. I, 27–28; R. III, 668–669, 784–785, R. I, 259, 256). Superintendent Altman hurried to Vice President Railey's office (R. III, 669). The two returned to Altman's office (R. II, 522, R. III, 669), and the five stewards were summoned (R. III, 670, R. II, 524). Vice President Railey thereupon discharged the stewards, informing them that under the terms of the closed-shop agreement he was obliged upon demand to terminate their employment until they were restored to good standing by the C. I. O. (R. I, 70, 29; R. I, 194, 256–257, 288–289). Each of the stewards was given a letter by the C. I. O. officials (R. I, 29; R. II, 525, 670, R. I, 193). The stewards there-

upon left Altman's office (R. I, 29; R. I, 195, R. II, 525, R. III, 670–671). The letters notified the stewards that they were suspended from membership in the C. I. O. pending a union trial upon unspecified charges alleging the violation of the C. I. O.'s Declaration of Principles, Oath of Membership, and Article 9, Section 1, of the C. I. O. Constitution and By-Laws, all of which are platitudinous in nature (R. I, 70; R. III, 847–848, R. I, 229, R. III, 853–856, R. II, 617).

Immediately following the discharge of the five stewards, the C. I. O. representatives distributed throughout the plant a bulletin reading (R. I, 70, 31–32; R. I, 256, R. III, 785, R. I, 259):

ATTENTION

All Warehouse Union Members:

An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union
Local #6, I. L. W. U.

That afternoon, according to Vice President Railey, the factory was "in a state of turmoil due to the fact of a lot of conversation and visiting, and union people going through the plants, and people couldn't get their work done" (R. I, 36; R. II, 528).

Of the 313 production and maintenance employees (R. I, 61, n. 30; R. II, 421–422), more than 200 attended the scheduled anti-C. I. O. meeting (R. I, 70, 32; R. I, 196, 256). Two major decisions were made. It was unanimously resolved to break relations with the C. I. O. and to form an independent union, known as Employees Welfare Association, until affiliation with a strong international union could be accomplished (R. I, 70, 32; R. I, 196, 200–201, 261, 288, R. III, 848, R. I, 259). It was also unanimously agreed that four employees, Thompson, Sherman, Lonnberg, and Olsen, designated committeemen and elected to act as officers of the interim organization, should seek the reinstatement of the discharged stewards, and that should they fail in their quest, all the employees would in protest cease working (R. I, 70, 33; R. I, 196, 199, R. III, 849, R. I, 259). Upon the close of the meeting the four committeemen dispatched the following telegram to Vice President Railey (R. I, 70–71, 34; R. I, 257, R. III, 786–787, R. I, 259):

> You are hereby notified of action taken by more than 200 employees of Colgate Palmolive Peet Co All being former members of ILWU 1–6 and being more than 50 percent of total employees have withdrawn and severed relations with ILWU–6 as collective bargaining agent.
>
> Employees Welfare Association
> By Negotiating Committee
> E. H. Thompson,
> William Sherman,
> H. Lonnberg,
> L. Olson

A telegram of similar purport was sent to the C. I. O. (R. I, 33–34; R. I, 257, R. III, 786, R. I. 259).

On the following morning, July 31, 1945, the four committeemen called upon Vice President Railey at his office, and unsuccessfully urged the reinstatement of the five discharged stewards (R. I, 71; R I, 257, R. II, 360–361). Railey persisted in his position that under the closed-shop agreement he had no choice but to comply with the C. I. O.'s demand (R. I, 34; R. I, 257). He was told that he would shortly receive a telegram indicating the employees' wish that the C. I. O.'s authority to act on their behalf be terminated, and during the conversation the telegram which had been dispatched the previous evening was in fact received by Railey (R. I, 71, 35; R. II, 368–369, 377–378).

Meanwhile, Superintendent Altman joined the conference stating that a group of C. I. O. officials were presently in his office (R. I, 35; R. II, 527). They were invited into Railey's office (R. I, 35; R. II, 361, 527). An acrimonious debate ensued between Committeeman Sherman and C. I. O. President Lynden during which Lynden sought to justify the C. I. O. wage policy (R. I, 35; R. II, 545–546, 528). Vice President Railey in his testimony agreed that "it became quite apparent as this conversation took place that there was a schism developing in the ranks of the C. I. O." (R. II, 545–546). Indeed, at this very conference, the C. I. O. officials, in the presence of the employer's ranking officials, bluntly informed the four committeemen that suspension notices for three

of them were already in preparation (R. I, 71; R. I, 263–264), and requested the name of the fourth one, Olsen, so that they could prepare such notice for him. Later that morning the employer received a formal request from the C. I. O. notifying it of the suspension of Thompson, Sherman, Lonnberg, and Olsen from membership in the C. I. O. and requesting their discharge (R. I, 71, 36–37; R. III, 673–675, 846–847).

That same morning, C. I. O. representatives circulated another bulletin among the employees at the plant (R. I, 71, 37; R. I, 257). The leaflet warned the employees against aligning themselves with "Sherman-Marshall-Lundeberg & Co.," lest they jeopardize "their own reputation, their union standing, their seniority, and their jobs," and pointedly referred them to "the provisions of the union contract, including the requirement that only members of Warehouse Union, Local #6, ILWU, in good standing may be employed by the company" (R. I, 71, 37–38; R. III, 789, R. I, 259). Despite this warning, a majority of the employees, upon learning of the refusal to reinstate the five stewards, at noon left the plant in order to hold a second anti-C. I. O. meeting (R. I, 71, 38; R. I, 257). Vice President Railey, who attended the meeting upon invitation, addressed the employees, stating that the reinstatement of the stewards was impossible because of the employer's contractual obligation under the collective agreement (R. I, 72, 38–39; R. I, 257–258, R. II, 529–531). Dissatisfied with Railey's explanation, and having failed in their effort to secure the reinstate-

ment of the stewards, the employees in protest voted to reaffirm their resolution not to return to work (R. I, 72, 38–39; R. I, 202, 258, 266, R. III, 850–851, R. I, 259). The strike lasted two and one-half days, and most of the workers participated in it (R. I, 72, 39; R. III, 677, R. II, 533).

Two days later, on August 2, 1945, a third anti-C. I. O. meeting was held, again attended by a substantial majority of the employees, at which it was voted to dissolve Employees Welfare Association, to affiliate with International Chemical Workers Union, A. F. L., herein called the A. F. L., and to return to work the following morning pending an election among the employees to be requested of the National Labor Relations Board (R. I, 72, 40; R. I, 258, R. III, 851–852, R. I, 259). The next morning, all the employees returned to work except the five stewards, who had been previously discharged, and the four committeemen, who had been told the day before by Superintendent Altman that in view of their suspension it would be futile for them to report to work (R. I, 72, 39–40; R. I, 258, 266–268, R. II, 378, R. III, 806–807, R. II, 654–656).

D. The employer's knowledge of events preceding its refusal to reemploy the stewards and the committeemen and its discharge of the twenty-eight additional employees at the C. I. O.'s request apprising the employer of the C. I. O.'s discriminatory purpose

The initial organizational efforts of the insurgent employees culminating in the discharge of the stewards and the committeemen at the C. I. O.'s request were followed by intensified organizational efforts to which the C. I. O. retaliated with further discharge-

demands under the closed-shop contract. The events preceding its accession to the C. I. O.'s demands furnished the employer with additional information apprising it of the C. I. O.'s discriminatory purpose.

1. The employer's knowledge of events relating to formal Board proceedings dealing with the rival union activities

Upon the completion of affiliation with the A. F. L., steps were undertaken by it to secure a change of representatives by resort to formal Board process. On August 3, 1945, the A. F. L. filed a petition for the investigation and certification of representatives. On August 8, 1945, the A. F. L., the C. I. O., and the employer met informally to discuss the petition at a preliminary conference at the Board's regional office in San Francisco. Notice of formal hearing was issued on August 14, 1945, was received by the employer on August 17, 1945, and the hearing was held on August 22, 1945 (R. I, 72, 73, 41, 45; R. II, 549–552; R. III, 799–805).[8]

In addition to the A. F. L.'s invocation of the Board's election machinery to resolve the representation question, the A. F. L. invoked the Board's processes for the redress of unfair labor practices in order to remedy the dismissal of the stewards and

[8] Pursuant to the Board's Decision and Direction of Election issued on September 26, 1945, an election was held on October 16, 1945, at which the A. F. L. was defeated 181 to 126 (R. I, 75; R. II, 549–552, R. III, 799–805). Thereafter, upon objections to the election filed by the A. F. L., the election was set aside by the Board because the employer's discharge of employees at the C. I. O.'s request for protected union activities prevented the result of the election from being truly representative of the employees' untrammeled wishes (R. I, 75, 79, 83).

the committeemen. On August 13, 1945, the A. F. L. verified, and the next day filed, the original charge alleging the discriminatory dismissal of the stewards and the committeemen (R. I, 72; R. I, 92–93). Because of the Board's practice promptly to inform persons of charges filed against them, the Board inferred that the employer was apprised of this charge by August 17, 1945 (R. I, 77–78). The employer admittedly knew of it on August 22, 1945 (R. I, 107).

2. The employer's knowledge of the C. I. O.'s retaliatory campaign

Upon the employer's notification on August 8, 1945, of the filing by the A. F. L. of a petition for certification of representatives, Vice President Railey agreed that it was readily apparent that a campaign for the employees' favor was being conducted by the A. F. L. and the C. I. O. (R. I, 72; R. II, 547). Labor Relations Director Wood in his daily tours of the plant was handed union literature which was being circulated in profusion throughout the plant, and he observed the A. F. L. buttons which the employees were wearing on their work clothes (R. III, 759–761). This campaign was open, widespread, and intense (R. I, 72, 41; R. I, 299–301, 305–314, 330–332, R. II, 344, 387–388, 391–394, 411–414, 430–431, 433–436, 438–439, 475–478, 481–488, 516, 564, 566, 580–581, 583–584, 592–594, 598, 607, 608–612, 631–632, 642, R. III, 785, 789–790, R. I. 259, 794–798, 808–847). The C. I. O., in the conduct of its campaign, both orally and through leaflets, made clear that the price of adherence to the A. F. L. was discharge under the closed-shop contract (R. I, 72, 77, 43–44; R. I, 299–300, 305–314,

R. II, 438–439, 475, 481–488, 516, 564, 580–581, 592–594, 598, 608–609, 631–632, 642, R. III, 785, 789–790, R. I, 259, R. III, 794–798; R. II, 476–477). Aware of the C. I. O.'s retaliatory campaign, Labor Relations Director Wood conceded that he knew that the C. I. O.'s subsequent discharge demands were motivated in part at least by the "union activities" of the A. F. L. adherents (R. I, 78, 49; R. III, 737).[9] Illustrative of the C. I. O.'s campaign was its leaflet, widely distributed throughout the plant and posted on a plant bulletin board on August 22, 1945, the day of the hearing on the A. F. L.'s election petition, warning the employees of discharge for pro-A. F. L. or anti-C. I. O. activity (R. I, 73; R. III, 796, 798, R. II, 476–478). The leaflet read in part:

* * * * *

> 6. Only members of the Warehouse Union, Local 6, work at Colgate Palmolive Peet Company. If anyone says different—let him test it.

[9] It is unlikely that any notable aspect of employee thinking escapes managerial attention. In the discharge of their managerial duties, Superintendent Altman and Labor Relations Director Wood, top-ranking officials at the employer's Berkeley plant (R. I, 180–182), made daily tours of the plant (R. III, 696–697, 757–758). One of the bulletin boards upon which employees post notices is in the immediate vicinity of the offices of the managerial staff (R. I, 191–192). Superintendent Altman passes by this bulletin board several times each day, and generally reads any new notices placed on the board (R. III, 686–687). In making his daily rounds Labor Relations Director Wood occasionally talks with the employees (R. III, 758), observes the matter placed on the various bulletin boards (R. III, 759), and during the course of the union electioneering received union literature (R. III, 759–760). Lesser supervisory officials, being in more immediate contact with the employees, necessarily have an even more intimate knowledge of employee opinion.

7. Any Peet's employee reported as trying to get people to bolt the C. I. O. and join the A. F. L. or wearing an A. F. L. button, will be taken off the job.

* * * * *

10. As a result of the investigation last week, we have found it necessary to consider the removal of several more of the ringleaders who have violated all of our rules.

* * * * *

We suggest: If you value your future at Colgate Palmolive Peet; if you enjoy your present job; if you would like to retain your seniority and pension, and receive the retroactive pay due you, we advise you to think carefully about everything told you—then tell the A. F. L. disrupters that you are not interested in their form of phoney unionism.

Warehouse Union, Local 6, ILWU

3. The employer's knowledge of threats to A. F. L. adherents by the C. I. O.

On the afternoon of August 11, 1945, a C. I. O. official remonstrated with employee Albert Zulaica, subsequently discharged on September 1 under the closed-shop contract (R. I, 74; R. III, 792, 806; R. II, 654–656, *infra,* pp. 21–23), for his active advocacy of the A. F. L., warning him that such conduct by the employees would lead to their dismissal (R. I, 41; R. I, 305–310). In reply to Zulaica's assertion that "if you start doing that you will have to throw the majority out because most of them are wearing an A. F. L. button," the C. I. O. official stated, "we don't have to do that. * * * We can pick some of you out and claim that you were leaders, and that

will scare the rest of them" (R. I, 42; R. I, 309–310). On the following Monday morning, August 13, 1945, Zulaica reported the gist of this conversation to his foreman asking him to talk to the superintendent or assistant superintendent about it. That afternoon Assistant Superintendent Stanberry told Zulaica "I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union" (R. I, 73; R. I, 310–312).

On August 30, 1945, a C. I. O. official visited Labor Relations Director Wood at his office and demanded the discharge of an estimated seventy employees, about one-fifth of the working force, upon the asserted ground that they were not members of the C. I. O. in good standing (R. I, 73–74; R. III, 728–731). Wood told him, "Go to hell * * * I [am] * * * not going to act on any such order * * * This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down * * * I want to talk to [C. I. O. Vice President] Heide about this thing before we get into this thing any deeper" (R. I, 74; R. III, 730). After a discussion with Heide, this particular request was evidently withdrawn (R. I, 74; R. III, 730).

On August 31, 1945, a C. I. O. official approached employee Kay Norris in the plant (R. I, 74; R. II, 483–484). On the previous day, this C. I. O. official

on plant premises had warned Norris to desist from campaigning on behalf of the A. F. L. (R. II, 480–482. Referring to this earlier conversation, the C. I. O. official asked Norris whether she "had changed * * * [her] mind," that he had given her "time to go home and think it over," and was she ready to "drop A. F. of L. and stick by C. I. O." (R. I, 74; R. II, 484). Upon being told that she had not changed her mind, he said, "I held out a letter for you until today * * * You are fired. You might as well get off the floor right now" (R. I, 74; R. II, 484). Norris immediately reported to Assistant Superintendent Stanberry that "that union fellow kicked me off the floor. He told me I was fired" (R. I, 74; R. II, 484, 485). Stanberry replied, "He can't do that" (R. II, 484). She then attempted to report the incident to Superintendent Altman, but on finding him out of his office reported it to another person in the office who told her to ignore the statement and return to work (R. I, 74; R. II, 485). As hereinafter more fully related (pp. 21–23, *infra*), on the next day, September 1, Norris and seventeen others were discharged under the closed-shop contract (R. I, 74; R. III, 792, 806–807, R. II, 654–656).

E. The employer, knowing the C. I. O.'s discriminatory purpose, accedes to the C. I. O.'s request to discharge the twenty-eight additional employees for their rival union activities, and refuses to reemploy the stewards and the committeemen

In addition to the discharge of the five stewards and the four committeemen, whom the employer subsequently refused to reemploy upon their request

(*infra,* p. 20), the C. I. O. secured the dismissal of twenty-eight additional employees pursuant to the closed-shop agreement (R. I, 74; R. III, 806–807, R. II, 654–656). All of the discharged employees had joined the A. F. L., worn A. F. L. buttons prominently in the plant, taken an active role in A. F. L. organizational activities, and participated in the two and a half days' work stoppage (R. II, 656–657, 506–507). All of them, with two exceptions,[10] attended the meetings of July 30, 31, and August 2, 1945, and concurred in the actions taken at these meetings (R. II, 506). Their discharge, and the refusal to reemploy the stewards and the committeemen, occurred under the following circumstances:

1. The refusal to reemploy the stewards and the committeemen on August 17

On August 17, 1945, the five stewards and the four committeemen reported to work, but their request for reinstatement was denied (R. I, 73; R. I, 267–268, 289–290, R. II, 341–342, 380–381, 427, R. III, 679–680, 699–700). Labor Relations Director Wood stated that "I fell back on our legal advice" and represented to the discharged employees that under the closed-shop contract the employer was under an absolute duty to abide by the C. I. O.'s wishes (R. I, 73; R. III, 727–728). They were told by Wood that "You will have to remain out until the issue has been determined between you and the C. I. O." (R. I, 73; R. III, 728).

[10] The complaint was dismissed insofar as it related to the third exception, Rose Gilbert (Schneider) (R. I, 74, 21).

2. The discharge of six employees on August 31

On the morning of August 31, 1945, the C. I. O. requested and obtained the discharge of six employees pursuant to the closed-shop agreement (R. I, 46; R. III, 806–807, R. II, 654–656). The discharges were effected in conjunction with a wholesale inspection of the employees' union dues books.[11] This inspection was conducted by C. I. O. officials in the vicinity of the entrance to the plant during the time when the employees were reporting to work on the morning shift (R. I, 46; R. III, 681–682, 709–716). Superintendent Altman and Assistant Superintendent Carter were present to observe the event (R. III, 681–682, 710–711). Assistant Superintendent Carter saw the C. I. O. officials hand envelopes to some of the employees, and heard them tell these employees that they could not report to work (R. III, 715–716). One employee who received a suspension notice was told, "Here is a letter for you, and you are fired. You cannot work here anymore. * * * You go to your A. F. of L. friends to help you now" (R. II, 516). Another suspended employee who received a notice was told, "take it back to your union, see if they can put you back to work, you are so crazy about them," (R. II, 564).

3. The discharge of eighteen employees on September 1

On September 1, 1945, the C. I. O. requested and obtained the discharge of eighteen more employees

[11] It was stipulated at the hearing that the C. I. O. did not request the discharge of any of the stewards, the committeemen, or the twenty-eight additional employees because of delinquency in the payment of union dues to the C. I. O. (R. II, 518).

pursuant to the closed-shop contract (R. I, 74, 46–47; R. III, 806–807, R. II, 654–656). On that day, the C. I. O. delivered a letter to the employer stating that these eighteen employees had been suspended discharge (R. I, 46–47; R. III, 792, R. I, 315, 684 R. from membership in the C. I. O. and requesting their II, 534. After a conference among the employer's officials, it was decided to call the designated employees into Vice President Railey's office to inform them that their employment was terminated (R. I, 47; R. III, 732–734, R. I, 313–316, R. II, 534–535, 567–568, 572–573, 620–621). The eighteen were called in and Labor Relations Director Wood reiterated to the assembled employees the management's position that it was under an absolute duty under its closed-shop contract to discharge them upon demand of the C. I. O. (R. I, 47; R. II, 735). A turbulent session ensued, during which employee Norris, whose discharge was requested, expressed her conviction that the employees were dismissed because "we wore A. F. of L. buttons and we distributed literature," to which Wood replied, "I guess it is so, that could be it" (R. II, 488). She further testified that Wood stated, "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess" (R. II, 488–489). Another employee testified that Wood said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (R. I, 316). A third employee testified that Wood said, "If we [the discharged employees] didn't wear the AFL buttons and didn't talk too much, why, we wouldn't get in this trouble in the first place") R. II, 577). One of the assembled em-

ployees complained, "I don't see why we can't change from from one union to another" (R. II, 492).

4. The discharge of four employees on September 5, 7, and 11

Several days later, four additional employees were dismissed pursuant to the closed-shop contract: employee Franklin Richmond was discharged on September 5, employees Manuel Alegre and John Perucca on September 7, and employee Edward Navarro on September 11 (R. I, 50 and n. 20; R. III, 806–807, R. II, 654–656).

About September 1, 1945, employee Fraklin Richmond, while wearing an A. F. L. button on his work clothes, was approached in the plant by a C. I. O. official who demanded to see his union book (R. I, 51; R. II, 630–631). Richmond walked over to his supervisor and asked whether "this goon had any right to come in here and demand to see my book merely because I have got a button on." His supervisor replied, "Well, he can ask to see your book, is all." Upon receiving the union book, the C. I. O. official noted its number. Richmond stated, "Now I suppose I will get one of your letters?" He was told, "You will!" And he did. (R. I, 51–52; R. II, 631–632.) Several days thereafter Superintendent Altman informed Richmond that he was required to discharge him because he had been named in a C. I. O. notice of suspension (R. II, 632–635). Richmond told Altman "that for every one of us that were laid off like that, for wearing those buttons, he was going to have some kind of charge placed against him" (R. II, 634).

Edward Navarro, together with three or four other machinists employed at the plant, were members of a C. I. O. union, the East Bay Union of Machinists, Local 1304, and because of their membership in the Machinist's Union all of them were permitted to work at the plant without obtaining membership in the C. I. O. local at the plant (R. I, 52; R. II, 641–642, 645–646). About September 4, 1945, Labor Relations Director Wood told Navarro that it would be necessary for him to transfer to the C. I. O. local at the plant (R. II, 642). He applied for a transfer but the C. I. O. local in the plant refused to grant it because he "was wearing an A. F. of L. button in the plant" (R. II, 642). The employer thereupon discharged him (R. I, 50 and n. 20; R. III, 806–807). The other machinists, however, were permitted to continue to work without obtaining membership in the C. I. O. local at the plant (R. II, 646).[12]

F. The C. I. O.'s subsequent trial of the discharged employees

Subsequent to their discharge, the five stewards, the four committeemen, and the twenty-eight additional employees were tried before C. I. O. tribunals. The transcripts of the proceedings before the C. I. O. tribunals and the decisions of the C. I. O. trial committees were received in evidence, not to establish the truth of the matter asserted therein for which they were incompetent hearsay, but for the limited

[12] There is no difference in principle between the refusal to qualify an employee for membership in a union because of his protected activities on behalf of a rival union and the withdrawal from an employee of his good standing in a union because of his protected activities on behalf of a rival union.

purpose of establishing that proceedings were held and that decisions were rendered (R. III, 769–771, 778–779). On October 3, 1945, the C. I. O. tried the five stewards and the four committeemen *in absentia,* and on October 10, 1945, a decision of the trial committee was issued recommending their expulsion from the C. I. O. (R. I, 52–53; R. III, 856–866, 877–922). About mid-November 1945, the C. I. O. informed Labor Relations Director Wood of this action (R. 54; R. III, 741, 762). On December 17, 1945, the twenty-eight additional employees, with the exception of Edward Navarro, were tried by a C. I. O. tribunal (R. I, 52; R. III, 923–987). Some of these employees protested what they believed to be the irregularity of the proceeding, and forthwith withdrew from further participation in it (R. III, 924, 930–935). The remaining employees participated in the proceeding, and during its course entered a so-called "guilty" plea admitting that they engaged in the two and a half days' work stoppage (R. II, 506–507, R. III, 969–976). On December 24, 1945, a decision of the trial committee was issued recommending that the employees who withdrew from the proceeding be expelled and that the employees who pleaded "guilty" be placed on probationary status (R. I, 53–54; R. III, 867–876). About January 1, 1946, the C. I. O. informed Labor Relations Director Wood of this action (R. I, 54; R. III, 742, 762).[13]

[13] Notwithstanding the unparticularized stress which the employer places on these trials (Emp. Br., pp. 5, 15–16, 37, 53–55), it is clear that, since the trials occurred subsequent to the discharge of the employees, they have no relevance to the question of the employer's knowledge, at the time of the discharge, of the

II. The Board's conclusions of law

On the basis of the foregoing facts, the Board determined that "It is clear from the record, and we find, that the [employer] *knew* of the C. I. O.'s reason for demanding the discharges" (R. I, 76), namely, that the C. I. O. was "acting in reprisal against the complainants because of their anti-C. I. O. activity" (R. I, 79). The employer "knew, when it discharged and refused to reinstate the complainants, that the C. I. O. demanded such action because of the complainants' exercise of the right guaranteed employees in the Act to bargain collectively through representatives 'of their own choosing' " (R. I, 76). The Board concluded that the employer "thereby violated Section 8 (1) and (3) of the Act, for the reasons stated in the *Rutland Court* case" (R. I, 76).

In *Matter of Rutland Court Owners,*[14] as in *Matter of Portland Lumber Mills,*[15] which the Board also cites in support of its conclusion (R. I, 76, n. 6), in which the Board's order was enforced by this Court, the Board enunciated the principle that an employer

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C. I. O.'s discriminatory purpose in requesting the discharges pursuant to the closed-shop agreement. The employer also stresses the "guilty" plea of some of the employees (Emp. Br., pp. 37, 54–55), but an examination of the trial transcript (R. III, 969–976) indicates that the employees did no more than admit that they engaged in the work stoppage, a fact which was never denied and which was true of most of the 313 employees. Their plea was in the nature of a demurrer to the complaint; they were not acting as penitents throwing themselves on the mercy of the tribunal.

[14] 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

[15] 64 N. L. R. B. 159, enforced, *sub nom., Local No. 2880* v. *N. L. R. B.*, 158 F. 2d 365 (C. C. A. 9), cert. granted, 331 U. S. 798, dismissed on motion of petitioner, 332 U. S. 845.

cannot properly discharge employees pursuant to the closed-shop provisions of a contract when, to his knowledge, the discharge is requested by the union which is a party to the contract for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. By this principle the Board has sought to prevent a closed-shop agreement from being converted into a device to accomplish the perennial suppression of the employees' will in the matter of choice of representatives. In the *Rutland Court* case the Board, by adopting this principle, attempted to work out an accommodation between the sometimes conflicting interest of the free choice of representatives by employees, on the one hand, and of union security and stability of the bargaining relationship, on the other.

III. The Board's order

The Board's order requires the employer to cease and desist from encouraging or discouraging membership in the A. F. of L., the C. I. O., or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire, tenure, or other terms of employment (R. I, 80). Affirmatively, the Board's order requires the employer to offer reinstatement with back pay to the

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thirty-seven employees, and to post an appropriate notice (R. I, 81–82.)[16]

SUMMARY OF ARGUMENT

I. The proviso to Section 8 (3) of the National Labor Relations Act does not require or permit an employer to comply with the closed-shop provisions of a contract when, to his knowledge, discharges pursuant to the contract are sought by the contracting union as a penalty for rival union activities carried on during a period when it is appropriate for the employees to seek a redetermination of representatives. This view represents the most reasonable reconciliation between the general guarantees of the Act, which permit employees to choose and change representatives, and the limitations imposed by the proviso, which permit discipline of employees in the interest of union security and stability of the bargaining relationship.

An employer's answerability for his wrongdoing in discriminating against employees by knowingly discharging them for rival union activity carried on at an appropriate period is not affected by the Board's lack of power to reach the contracting union's independent wrongdoing in requesting the discharges for such protected activity by employees. The Act, prior to its amendment, contemplated affording protection to employees engaged in rival union activity, and the amendments to the Act, in retaining employer re-

[16] That part of the Board's order (R. I, 83) which sets aside the election is not before the Court for review at the present time. *N. L. R. B.* v. *Falk Corporation*, 308 U. S. 453. Contrary to intimations in the employer's brief (pp. 8, 11, 24), the Board's order does not set aside the closed-shop agreement.

sponsibility for wrongful discharges pursuant to a union security agreement, confirm the propriety of the Board's construction.

II. There is substantial evidence to support the Board's finding that the employer knew of the C. I. O.'s discriminatory purpose when, acceding to the C. I. O.'s request, it discharged the stewards and the committeemen, refused to reemploy them upon request, and discharged the twenty-eight additional employees. The employer's disregard of its knowledge of the C. I. O.'s discriminatory purpose, in reliance upon a mistaken view of the law, does not exculpate it from the consequences of its unlawful conduct. Nor, assuming the truth of the assertion, is it material that, to the employer's knowledge, there were other grounds for the contracting union's discharge request in addition to its discriminatory reliance upon rival union activities.

The employer's knowledge of the contracting union's discriminatory purpose may be inferred from the evidence of the information as to which the employer was apprised in the same manner in which notice in other fields is traditionally proved. In refusing to credit the employer's denial of knowledge, because of circumstances which make the truth of the disclaimer improbable, the Board does not place the employer in the role of a judge of the union's reasons for the discharge but merely exercises the traditional function of any trier of fact. Nor does the Board place upon the employer an implicit burden to seek out information as to the contracting union's purpose; it holds only that the employer may

not act in disregard of the plain import of facts of which it is apprised.

III. The rival union activities of the A. F. L. adherents occurred during a period when it was appropriate for the employees to seek a redetermination of representatives. The closed-shop agreement for an indefinite term between the C. I. O. and the employer, in existence for more than four years, no longer provided the C. I. O. immunity from challenge, because at that stage, under the Board's well-settled rules, the need of affording the employees an opportunity to oust or reaffirm their bargaining representative prevailed over the need for affording a period of quiet enjoyment to an agreement arrived at through collective bargaining.

IV. California local law substantially subscribes to the interpretation of the obligations of a closed-shop agreement as not requiring or permitting the discriminatory discharge of employees for rival union activity carried on at an appropriate time. Moreover, assuming California local law commands conduct inconsistent with that required by the National Labor Relations Act, local law must yield to paramount federal law where the two cannot stand together.

V. In affording protection to employees wrongfully discharged pursuant to a closed-shop contract, the Act does not offend the due-process requirements of the Fifth Amendment. In the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife.

ARGUMENT

I

The closed-shop proviso to Section 8 (3) of the National Labor Relations Act does not protect the employer in discharges of employees for rival union activities occurring at a time when employees may appropriately change bargaining representatives

The disposition of this case is governed by the principle enunciated by the Board in *Matter of Rutland Court Owners,* 44 N. L. R. B. 587; 46 N. L. R. B. 1040. By that principle, familiarly known as the *Rutland Court* doctrine, the Board adopts the view that the proviso to Section 8 (3) of the Act does not require or permit an employer to comply with the closed-shop provisions of a contract when, to his knowledge, enforcement of the contract is being sought as a penalty for rival union activities, where such rival union activities are carried on during a period when it is appropriate for the employees to seek a redetermination of representatives. This view represents the Board's considered judgment as to how the conflict between the general guarantees of the Act, which permit employees to choose and change representatives, and the limitations imposed by the proviso, which permits discipline of employees in the interest of union security and stability of the bargaining relationship, may most reasonably be reconciled so that the legitimate scope of each may be preserved without nullifying the other. The resolution of the antinomy in these terms requires rejection of the absolute view that any discharge pursuant to a closed-shop contract is justified without question.

The Board's refusal to accept an interpretation of the proviso which would convert it into an instrument for suppressing the democratic aspirations for orderly change has received unqualified approval by this Court in *Local No. 2880* v. *N. L. R. B.*, 158 F. 2d 365 (C. C. A. 9).[17] The Circuit Court of Appeals for the Second Circuit has likewise expressed its unqualified approval of the Board's *Rutland Court* doctrine in *N. L. R. B.* v. *American White Cross Laboratories*, 160 F. 2d 75 (C. C. A. 2).[18] The Board's rationale is required by the salutary principle enunciated by the Supreme Court in *Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248. It has received explicit confirmation by Congress in the amendments recently made in the National Labor Relations Act (Sections 8 (a) (3) (A) and (B), 8 (b) (2), and 10 (c) of the Act, as amended).[19] As this Court declared in the *Local 2880* case, *supra*, 158 F. 2d, at 368, 369:

> The Board's construction of the proviso of Subsection 8 (3) with relation to Section 7 con-

[17] Certiorari granted, 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U. S. 845. The case is noted in 56 Yale L. J. 1048 (1947); 15 U. of Chi. L. Rev. 232 (1947); and 33 Va. L. Rev. 521 (1947).

[18] See also, *Colonie Fibre Company, Inc.*, v. *N. L. R. B.*, 163 F. 2d 65 (C. C. A. 2). *Contra, Lewis Meier & Co.* v. *N. L. R. B.*, 21 L. R. R. M. 2093 (C. C. A. 7, November 3, 1947), "on the authority of *Aluminum Company of America* v. *National Labor Relations Board* (1946), 159 F. 2d 523 [C. C. A. 7]."

[19] Inasmuch as Section 102 of the Labor Management Relations Act, precludes a retroactive application of its terms to make unlawful that which was, prior to its enactment, not an unfair labor practice, it is necessary to determine whether the conduct herein complained of was violative of the National Labor Relations Act prior to its amendment.

> ferring on * * * all employees the right to "bargain collectively through representatives of their own choosing," as not warranting a discharge for activities at an election for such choice is so obviously rational that we well could be required to accept it under the rule that upon "questions of law the experienced judgment of the Board is entitled to great weight." *Medo Corporation* v. *National Labor Relations Board,* 321 U. S. 678, 681. * * * we are of the opinion that it is the only interpretation to be given the proviso * * * The Board's interpretation, in addition to confirming the democratic process in bargaining agency elections, prevents the use of the proviso for the perpetuation of a particular union's control of the employees once it enters into a closed-shop contract with their employer.

A. The employer's challenge to the soundness of this Court's approval of the *Rutland Court* doctrine in the *Local 2880* case

The employer devotes much of its argument to an effort to bring into question the soundness of this Court's approval in the *Local 2880* case (158 F. 2d 365) of the rationale expressed by the Board in *Matter of Rutland Court Owners,* 44 N. L. R. B. 587; 46 N. L. R. B. 1040. In seeking to cast doubt upon the legal soundness of the Board's conclusion that the employer committed an unfair labor practice by discharging the A. F. L. adherents with knowledge that their suspension from membership in the C. I. O. was occasioned by their activities on behalf of a rival union during a period when it was appropriate to seek a redetermination of representatives, the em-

ployer repeats in substance the same contentions fully and unsuccessfully urged by the employer and the contracting union in the *Local 2880* case. We do not propose to burden the Court with reargument of the propriety of the Board's conclusion which this Court upon full consideration described as "the only interpretation to be given the proviso of Subsection 8 (3) for closed shop contracts" (*Local 2880* case, 158 F. 2d, at 368). A few observations will suffice to disclose the fallacy upon which the employer's argument is based.

The employer's argument is predicated upon the mistaken premise that because the Board was unable, prior to the amendments to the Act, to reach the contracting union's discriminatory conduct in requesting the discharge of rival union adherents under a closed-shop contract, the Board was equally powerless to reach the employer's discriminatory conduct in acceding to the contracting union's discharge demands notwithstanding the employer's knowledge of the union's discriminatory purpose. The contention fails to perceive and distinguish between the contracting union's wrongful act in requesting the discharge of rival union adherents, on the one hand, and the employer's own wrongful act in acceding to the discharge demands, on the other. The controlling factor is the employer's answerability for its own misconduct in discriminating against employees. The employer's responsibility is not minimized or extin-

guished because of lack of power to reach the contracting union's independent wrongdoing.

Nor is it sound to contend, as the employer does (Emp. Br., pp. 66–67), that the Act prior to its amendment did not contemplate the problems arising from rival unionism because the division in the American labor movement between the American Federation of Labor and the Congress of Industrial Organizations did not occur until after the adoption of the Act. The Supreme Court in *A. F. L.* v. *N. L. R. B.*, 308 U. S. 401, 411, n. 4, exposed the fallacy of this reasoning when it observed: "*Congress apparently recognized that representation proceedings under § 9 (c) might involve rival unions.* The House Committee said: 'Section 9 (c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. *The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees,* but the authority granted here is broad enough to take in the not infrequent case when only one such organized group is pressing for recognition, and its claim of representation is challenged.' H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22." [Emphasis supplied.]

The propriety of the Board's conclusion is confirmed by the retention of employer answerability for the wrongful discharge of employees under a union security agreement in Section 8 (a) (3) (A) and (B) of the Act, as amended. Indeed, Section 8 (a) (3) (C) of the final version of the Senate bill which

became the Act specifically provided that: "* * * no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (c) if he has reasonable grounds for believing that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9 (c) (1) (A), at a time when a question concerning representation may appropriately be raised."[20] Because Section 8 (a) (3) (A) and (B) as finally adopted authorized an employer to discharge employees under a union security agreement only (1) for failure to acquire union membership open to employees upon nondiscriminatory terms and (2) for nonpayment of union dues and initiation fees, it was unnecessary to retain the Senate bill's specific codification of the interpretation of the proviso to Section 8 (3) of the Act which this Court approved in the *Local 2880* case.[21] The significant fact is that employer responsibility for wrongful discharges under a union security agreement was never questioned at any time by Congress.

B. The employer's contention that it is placed in the role of a judge of the union's activities

The employer contends that the Board's decision places the employer in the role of a judge (Emp. Br., pp. 10–11, 17–19, 54, 99, 118–120). This same at-

[20] 1 Legislative History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), p. 238. For legislative comment see S. Rep. No. 105, 80th Cong., 1st Sess., pp. 21–22; 93 Cong. Record 1825.

[21] *Local No. 2880* v. *N. L. R. B.*, 158 F. 2d 365, 369 (C. C. A. 9), certiorari granted, 331 U. S. 798, dismissed on motion of petitioner, 332 U. S. 845.

tempt to substitute metaphor for analysis was rejected by this Court in the *Local 2880* case when Local 2880 in opposing the Board's position urged that the employer was required to "exercise a quasi-judicial process." [22] The contention evidently stems from the employer's misunderstanding of the effect of the Board's finding of knowledge. Upon the basis of evidence adduced at the hearing, the Board found, despite the employer's denial, that it knew of the C. I. O.'s discriminatory purpose. In so finding, the Board no more makes a judge of the employer than does a jury make a judge of a holder of a negotiable instrument when the jury returns a special verdict that the holder *knew,* at the time he received the instrument, despite his denial, that there was an infirmity in it.[23] "Notice is a fact, the existence of which is to be established by evidence in the same manner as the existence of any other fact is established; and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice." [24] As this Court has explained in an analogous situation, denial of knowledge, like the denial of any operative fact, simply renders its proof

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[22] Reply Brief of *Local 2880*, p. 2; Main Brief of *Local 2880*, p. 57.

[23] See 4 Williston, Contracts, § 1157 (Rev. Ed. 1936).

[24] In re *Leterman Becker & Co., Inc.*, 260 Fed. 543, 547 (C. C. A. 2), cert. denied, *sub nom*, *Coleman & Co.* v. *Towas Co.*, 250 U. S. 668. Substantial evidence is that quantum of proof which is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *N. L. R. B.* v. *Columbian Enameling and Stamping Co., Inc.*, 306 U. S. 292, 300.

difficult "because in the teeth of a denial the proof of motive must depend upon acts and circumstances which can never be conclusive and when motive is attributed to an artificial person it involves probing the intent of all the officers concerned."[25] Where, as here, knowledge is a prerequisite for charging a person with liability for conduct, the Board's refusal to credit the denial of knowledge, because of circumstances which make the truth of the disclaimer improbable, does not transform the unbelieved witness into a judge. It represents rather an unimpeachable exercise of a traditional function of any trier of fact.

Nor does the Board's decision, as the employer appears correlatively to contend, place upon the employer an implicit burden to seek out information. An employer is not required before complying with a discharge demand under a closed-shop agreement to conduct an investigation, to delve into the union's books and policies, or to police the union's conduct of its internal affairs.[26] But the disregard of the plain import of the facts of which the employer is apprised, or as the Board put it, the failure to make a "*bona fide* effort to evaluate all the evidence before it" (R. I, 79), can hardly serve to relieve the employer of its responsibility under the Act to desist from dis-

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[25] *N. L. R. B.* v. *Pacific Greyhound Line, Inc.*, 91 F. 2d 458, 459 (C. C. A. 9), modified on other grounds, 303 U. S. 272.

[26] Contentions to that effect were made to and implicitly rejected by the Supreme Court in *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248 (Employer's Br., pp. 52–54); were made to and implicitly rejected by the Circuit Court of Appeals of the Second Circuit in *N. L. R. B.* v. *American White Cross Laboratories, Inc.*, 160 F. 2d 75 (C. C. A. 2) (Employer's Br., pp. 3–5); were made to and implicitly rejected by this Court in the *Local 2880* case (Employer's Br., pp. 6, 19–20).

criminatory practices. To sanction an employer's adoption of a "see no evil, hear no evil, speak no evil" attitude would be to stultify a salutary principle designed to protect the employees' right to choose and change representatives by imposing upon it an unworkable standard of employer knowledge.[27] Surely, it is old law that a person "has no right to shut his eyes or ears to the inlet of information," and then claim in good faith that he is "without notice." [28]

II

The Board's finding that the employer knew of the C. I. O.'s discriminatory purpose when it acceded to the C. I. O.'s request to discharge, and when it refused to reinstate, the thirty-seven named employees is supported by substantial evidence

Under the *Rutland Court* doctrine an employer is responsible for the wrongful discharge of employees

[27] It may be noted that Section 8 (a) (3) (B) of the Act, as amended, provides that under a union-shop contract "no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * *if he has reasonable grounds for believing* that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Emphasis supplied.) In referring to this provision, the Senate Report on the bill which became the Act, as amended, stated, "The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer knowledge under the internal affairs of the union." S. Rep. No. 105, 80th Cong., 1st Sess., p. 20. This standard of employer knowledge under the amended Act appears to be less exacting than that which the Board required in this case in the interpretation of the proviso to Section 8 (3) of the Act prior to its amendment. See pp. 42–43, *infra*.

[28] *Simmons Creek Coal Company* v. *Doran*, 142 U. S. 417, 437, quoting from Virginia Court of Appeals in *Burwell's Admr's* v. *Fauber*, 21 Gratt. 446, 463.

pursuant to a closed-shop agreement only when the employer is shown to have knowledge that the incumbent union disqualified the employees from good standing and demanded their discharge for activities on behalf of a rival union.[29] In the *Local 2880* case, this Court anticipated that "Employers well may be perplexed by border-line cases of fact as to whether their employees' dismissals from a closed-shop union are for such electioneering for a rival union or for some of many other union reasons warranting their dismissal * * *" (158 F. 2d, at 369). The crux of this case is whether or not the employer *knew* when it acceded to the C. I. O.'s demands that the C. I. O. requested the discharge of the thirty-seven named employees because of their rival union activity.

The complexity or simplicity of this fact determination does not of course change the duty of the Board and the courts in relation to it. This relationship has been aptly stated by this Court in *N. L. R. B.* v. *Reeves Rubber Co.*, 153 F. 2d 340, 342 (C. C. A. 9): "It would serve no purpose to collate the unbroken line of expressions by the Supreme Court of the United States and every one of the United States Circuit Courts of Appeals, including this Circuit, that the Labor Board tries the facts and the reviewing court goes into facts only to find whether or not, as a matter of law, there is sub-

[29] The Board has developed a standard of employer knowledge by case to case adjudication. Requisite knowledge has been deemed lacking as an appropriate basis for employer liability in *Matter of Diamond T. Motor Co.*, 64 N. L. R. B. 1225, and *Matter of Spicer Manufacturing Corp.*, 70 N. L. R. B. 41. For recent cases where it has been deemed sufficient, see *Matter of E. L. Bruce Co.*, 73 N. L. R. B. 992, and *matter of Durasteel Co.*, 73 N. L. R. B. 941.

stance to the evidence upon which the Board has made its findings."[30] As in the *Reeves* case, so here, the record wholly justifies the conclusion that "there is quantity enough of relevant and competent evidence, if believed, to support the Board's findings. The Board's findings are conclusive to the effect that it did believe such evidence. Unless the evidence is so improbable upon its face as to the negative belief or so inconsistent as to destroy its credence, no error of law can be decreed by this reviewing court. The evidence given in the case upon which the Board based its findings cannot be characterized as either improbable beyond belief, or inconsistent to the point of destroying its credence" (153 F. 2d, at 342).[31]

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[30] As is apparently conceded by the employer (Emp. Br., p. 92), the amendments to the Act, in changing the language of Section 10 (e) from, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," to, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," make no material change in the applicable standard of judicial review. *N. L. R. B.* v. *Austin Co.*, 165 F. 2d 592, 595 (C. C. A. 7); Cf. *N. L. R. B.* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. C. A. 2); *N. L. R. B.* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. C. A. 5).

[31] The employer, quoting from *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 117 F. 2d 868, 878 (C. C. A. 7), contends that "while the report of the examiner is not binding on the Board," where, as here, the Board "reaches a conclusion opposed to that of the examiner, * * * the report of the latter has a bearing on the question of substantial support and materially detracts therefrom" (Emp. Br., p. 92). However, a trial examiner's report, in whatever posture, is recommendatory only, and can neither enhance nor detract from the conclusiveness of the Board's findings of fact. *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830–831, 834 (C. C. A. 9); *N. L. R. B.* v. *Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9, 16 (C. C. A. 8), *N. L. R. B.* v. *Blatt*, 143 F. 2d 268, 272, and n. 11 (C. C. A. 3).

A. The evidence showing knowledge

It is undisputable that the C. I. O.'s purpose in securing the discharge of the stewards and the committeemen, in precluding their reemployment upon application, and in securing the discharge of the twenty-eight additional employees, was to stifle the movement to displace it as the bargaining representative. The relevant inquiry is whether, in acceding to the C. I. O.'s demands, the employer was aware of the C. I. O.'s purpose. The employer's knowledge of reports given directly to it by employees threatened with discharge by the C. I. O. for their advocacy of the A. F. L., its knowledge of the open and widespread retaliatory campaign conducted by the C. I. O., and its knowledge of other circumstances demonstrating the C. I. O.'s discriminatory purpose could not fail to apprise the employer of the C. I. O.'s aim. In concluding that the employer "*knew* of the C. I. O.'s reason for demanding the discharges," the Board summarized the pertinent facts as follows (R. I, 76–78):

> Thus, several employees reported to management representatives that the C. I. O. was threatening them with discharge under the closed-shop contract for rival union activity; and the C. I. O.'s campaign along this line, both orally and by written leaflets, was open and widespread. Moreover, the [employer's] knowledge is further shown by its refusal to accede to the C. I. O.'s request for the discharge of what it apparently deemed to be too large and obvious a number of anti-C. I. O. employees. It is true that the [employer] was not in possession of all the facts prior to the

first and second groups of discharges. Before the discharge of the committeemen at the termination of the strike on August 3, 1945, however, the [employer] learned of the C. I. O.'s plan to use its closed-shop contract to remove its opponents, for when C. I. O. Vice President Heide discovered the anti-C. I. O. activity of the committeemen, he baldly told two management representatives, Vice President Railey and Superintendent Altman, that the commiteemen were thereupon being suspended. And before the discharge of the stewards the [employer] must have learned of their anti-C. I. O. activity, for it is unreasonable to suppose that it would have agreed to the request made by one of them to shut down operations in order to enable working employees to attend a meeting the stewards planned to hold without ascertaining the reason for the meeting. Moreover, the [employer], when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board. Finally, Labor Relations Director Wood admitted at the hearing, without making any differentiation among the various groups of discharges and refusals to reinstate, that he thought one of the reasons for the C. I. O.'s action was the complainants' anti-C. I. O. activity.

Consideration of the interrelated events preceding the discharges and the denials of reemployment conclusively supports the Board's conclusion.

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The movement to oust the C. I. O. as the bargaining representative came into being after a six-month period of steadily growing employee unrest and dissatisfaction with the C. I. O. Apart from the employer's general awareness of the state of employee opinion in the plant (*supra,* p. 16, n. 9), the plant stewards frequently reported their discontent with the C. I. O. officials to the employer. Only four days before the execution of the extension of the closed-shop agreement on July 24, a steward warned Vice President Railey of impending labor troubles at the plant. It was against this background of known employee disquiet that Superintendent Altman, upon seeing the notice of the first anti-C. I. O. meeting to be held on July 30, reported it to Labor Relations Director Wood when asked by him "if anything unusual had happened." It was against this background, too, that Luchsinger, a steward, and Olsen obtained Superintendent Altman's agreement to shut down the plant for two hours in order to afford the night-shift employees an opportunity to attend the meeting. That so important an interruption in production, apparently unprecedented, would be authorized to facilitate an employees' meeting without managerial ascertainment of its purpose is, to say the least, highly unlikely. The relationship between this prospective meeting, designed to lay the groundwork for displacement of the C. I. O. as bargaining agent, and the prompt request by the C. I. O. for the discharge of the five stewards who were its moving force, is patent.

Immediately following the suspension and discharge of the five stewards for their part in planning the anti-C. I. O. meeting, a C. I. O. leaflet was widely distributed throughout the plant warning the employees against attendance at this "illegal meeting * * * called by certain employees now under suspension * * * at the risk of losing membership and employment." Vice President Railey acknowledged that the plant was "in a state of turmoil." Notwithstanding the C. I. O.'s warning, most of the employees attended the meeting and voted to form a new labor organization as well as to seek the reinstatement of the stewards who were leading the insurgent movement. Promptly the next morning, the committeemen requested Vice President Railey to reinstate the stewards. They informed him that a telegram had been dispatched, which Railey received during the conference, advising him of the employees' desire to replace the C. I. O. as bargaining representative. Vice President Railey conceded that "it became quite apparent," during the interchange between the committeemen and the C. I. O. officials at this meeting, "that there was a schism developing in the ranks of the C. I. O." Indeed, on this very occasion, striking its second blow against the leadership of the insurgent movement, the C. I. O. notified the employer of the suspension of the committeemen.

Concurrently, with the suspension of the committeemen, another C. I. O. leaflet was widely distributed throughout the plant warning the employees that alignment with "Sherman-Marshall-Lundeberg &

Co.," who were the stewards and committeemen, would bring summary dismissal under the closed-shop contract. That same afternoon, a second anti-C. I. O. meeting was held, again attended by most of the employees, at which Vice President Railey, who had been invited to speak, sought to persuade the employees that the closed-shop agreement gave him no alternative but to discharge the stewards. Railey's attendance and speech at this meeting, at which the temper and object of the employees was patent, negates belief that he was unaware of the C. I. O.'s purpose. Railey's explanation failed to satisfy the employees, and, protesting the high-handed dispatch of their leadership, they refused to return to work for two and one-half days, a work stoppage which afforded the employer dramatic realization of the depth of the employees' desire to change bargaining representatives.

On August 3, after affiliation with the A. F. of L. had been completed at a third anti-C. I. O. meeting, all the employees returned to work with the exception of the stewards, who had been previously discharged, and the committeemen, who had been told the day before by the employer that their employment was terminated because of their suspension by the C. I. O. The collocation of events between July 30 and August 2, during which the intensity of the rift between the C. I. O. and the employees was dramatically manifest, ending with the definitive termination of the employment of the stewards and committeemen on August 3, could scarcely have left the employer with doubt as to

the C. I. O.'s discriminatory purpose when it complied with the C. I. O.'s discharge demands.

Whatever doubt the employer may have entertained concerning the C. I. O's reason for the suspension of the stewards and the committeemen was dissipated by events occurring prior to August 17 when the stewards and committeemen applied for and were denied reemployment. In the interim between August 3 and August 17, as the employer knew, the A. F. L. invoked the Board's election machinery as well as its processes for the redress of unfair labor practices. The A. F. L.'s petition for investigation and certification of representatives was filed on August 3, an informal conference attended by the employer, the A. F. L., and the C. I. O. pertaining to it was held at the Board's regional office on August 8, and notice of formal hearing was received by the employer on August 17. Electioneering by both unions was flourishing, and the tenor of the C. I. O.'s retaliatory campaign was plain. Moreover, the first of the reports from threatened employees had been received by the employer's officials on August 13, and employee Zulaica, in complaining of the attempt by the C. I. O. to intimidate him, was advised by Assistant Superintendent Stanberry to the effect: "I think all your trouble is because you are wearing those buttons. If you take them off, you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union" (*supra,* p. 18). Finally, Labor Relations Director Wood ad-

mitted at the hearing, without making any differentiation among the various groups of discharges and refusals to reinstate, that he thought one of the reasons for the C. I. O.'s action was the anti–C. I. O. activity of the A. F. L. adherents (R. I, 78; R. III, 737). Accordingly, the suspension of the stewards and committeemen by the C. I. O. because of their leadership of the movement to oust the C. I. O. as bargaining representative was known to the employer. Its refusal to reemploy them on August 17, knowing that their suspension by the C. I. O. was actuated by their protected activity on behalf of the A. F. L., is unambiguously within the rule "that discrimination in hiring is twin to discrimination in firing" and the Board is empowered "to restore to a man employment which was wrongfully denied him." *Phelps-Dodge Corporation* v. *N. L. R. B.,* 313 U. S. 177, 187–188; *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.,* 136 F. 2d 829, 833–834 (C. C. A. 9). The Board's conclusion that the stewards and committeemen were refused reinstatement by the employer with knowledge that they were denied employment because of their protected activities on behalf of a rival union is plainly proper (R. I, 78, 79).

It was against this fully developed pattern of retaliation that the employer, in addition to the termination of the employment of the stewards and the committeemen as leaders of the insurgent movement, acceded to the C. I. O.'s request to discharge the twenty-eight additional employees. Having eliminated the leadership, the C. I. O. sought to stifle the employees' rival union activity by striking a blow

against the main body of the insurgent movement. The C. I. O.'s principal thrust fell on August 31 and September 1 when twenty-four of the twenty-eight employees were discharged. The remaining four discharges on September 5, 7, and 11 were part of the same retaliatory pattern.

This pattern left little to the imagination. Its design was manifest in the hectic organizational period between July 30 and August 3 during which most of the 313 employees struck in protest against the C. I. O.'s discriminatory action (*supra,* pp. 10, 12–13); it was manifest in the C. I. O.'s retaliatory campaign epitomized in its widely circulated August 22 leaflet, "Any Peet's employee reported as trying to bolt the C. I. O. and join the A. F. L. or wearing an AFL button, will be taken off the job" (*supra,* pp. 16–17); it was manifest in C. I. O. threats to individual A. F. L. adherents which were reported to the employer (*supra,* pp. 17–19). Moreover, the C. I. O.'s extravagant request on August 30 that seventy employees be discharged, upon the omnibus, but transparent, ground that they were not in "good standing," was of necessity a demonstration to the employer of the C. I. O.'s discriminatory purpose since it was explicable on no other basis (*supra,* p. 18). Indeed during the turbulent session on September 1, when the discharge of eighteen employees was effectuated, the C. I. O. was directly accused of retaliatory tactics by the A. F. L. adherents, and Labor Relations Director Wood in effect confessed managerial knowledge of the C. I. O.'s discriminatory purpose when

he said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (*supra,* p. 22). In the light of these circumstances, to conclude that the employer did not know the C. I. O.'s punitive purpose would be to ascribe to the employer's officials a degree of credulity in the conduct of ordinary affairs to which experienced businessmen are not customarily addicted.

The employer's conduct in acceding to the C. I. O.'s discharge demands, inexplicable upon the basis of lack of knowledge of the C. I. O.'s discriminatory purpose, is wholly consistent with the different hypothesis which it urges in its brief to exculpate itself (Emp. Br., pp. 14, 46, 47–48, 116–117). Its course of action was predicated upon the rigid assumption that its closed-shop agreement imposed upon it an inflexible obligation to abide absolutely by the C. I. O.'s demands. The employer's representation to discharged employees between July 30 and September 11 was a consistent plea that under the closed-shop agreement it had no alternative but to dismiss them upon demand. (R. III, 726–727; *supra,* pp. 8, 11, 12, 20, 22.) This erroneous legal theory held out to the employer the possibility that it could avoid its duty under the Act by counter-poising to it an exaggerated duty under its closed-shop agreement, and thus render irrelevant its knowledge that the C. I. O.'s request for the discharge of the employees was based on the C. I. O.'s desire to punish the employees for engaging in activities to replace it as the bargaining representative. The employer's reliance upon this mis-

taken view of the law explains its indifference to its knowledge of the C. I. O.'s discriminatory purpose, but it does not serve to relieve the employer from answerability for its acts. It is elementary that a mistake of law does not shield the wrongdoer from the consequence of its unlawful conduct.[32] Accordingly, the Board's conclusion that the employer "discharged and refused to reinstate the complainants in violation of Section 8 (1) and (3) of the Act" is fully warranted (R. I, 79).

B. The employer's contentions

An analysis of the reasons suggested by the employer to discount the Board's conclusion that the employer knew of the C. I. O.'s discriminatory purpose serves to confirm the propriety of the Board's finding.

1. The employer's asserted reliance upon the telegram of July 31 as an act of withdrawal from the C. I. O.

The employer contends that the telegram it received from the insurgent employees on July 31, during the conference at which the reinstatement of the stewards was urged, notifying it "of action taken by more than 200 employees of Colgate Palmolive Peet Co. all being former members ILWU 1–6 and being more than 50 percent of total employees have withdrawn and severed relations with ILWU–6 as collective bargaining agent" (*supra,* p. 10), consti-

[32] Restatement, Restitution, § 7, Comment a: "Whether or not considered to be a fact, a rule of law is unlike other facts in that a person who does an act which otherwise would be unlawful is ordinarily not excused from liability because of a mistaken belief, however reasonable, that his act is rightful."

tuted a withdrawal of membership from the C. I. O. by the A. F. L. adherents and was accordingly a valid ground for discharge under the closed-shop agreement (Emp. Br., pp. 4, 14, 38–39, 40, 103–104). As this Court noted in a comparable situation, "the Board felt, and we think justifiably, that this claim of motivation is a palpable afterthought. [The telegram was] confessedly not assigned as a ground for [the] discharge[s] at the time [they] occurred, nor [was it] mentioned as a motivating factor in [the employer's] answer filed in the proceeding." *Wells, Inc.,* v. *N. L. R. B.,* 162 F. 2d 457, 459 (C. C. A. 9).

The C. I. O. at no time treated the telegram as an effective withdrawal from membership in the C. I. O., and at no time represented to the employer that its request for the discharge of the A. F. L. adherents was based on the telegram as an act of withdrawal from membership. Its formal representations contained in its letters to the employer requested the discharge of named employees because they had been "*suspended* from membership" pending a trial before a C. I. O. tribunal upon charges filed against them (R. III, 846–847, 784–785, 792–793). [Italics supplied.] As is apparent, the C. I. O. could not consistently maintain, and the employer cannot reasonably assert that it believed, that the employees were not members of the C. I. O., but that the C. I. O. at the same time asserted jurisdiction over them for the purposes of trial.

The telegram speaks of "more than 200 employees" and "more than 50 percent of total employees." The

disparate selection of a minority of these employees for discharge emphasizes that the telegram as an ostensible act of withdrawal from the C. I. O. played no part in the discharge demands. Moreover, the suggested construction glosses over the phrase reading "severed relations with I. L. W. U.-6 *as collective bargaining agent.*" [Italics supplied.] This is the key to the interpretation of the telegram and indicates the meaning which was ascribed to it by all, including the employer and the C. I. O. Its purport and intent, and the employer so understood it, was to express the desire of a majority of the employees to replace the C. I. O. as bargaining representative. As explained by Committeeman Sherman in his testimony: "It was not the intent of the telegram to segregate individuals as discontinuing affiliations with the C. I. O. The intent of the telegram was that we were discontinuing the bargaining agency, forming another group." (R. II, 399).

The Board correctly concluded (R. I, 78, n. 8): "As for the complainants' withdrawal from the C. I. O., which would ordinarily entitle the [employer] to discharge them in view of the closed-shop contract, it will be observed that the C. I. O. did not accept their withdrawals nor is there any evidence that the [employer] discharged them or rejected the reinstatement application of the stewards and the committeemen *for that reason.* On the contrary, the [employer's] answer and evidence show beyond dispute that the [employer] acted because of the complainants' suspension by the C. I. O. pending deter-

mination of charges of anti-C. I. O. activity, and that the attempted withdrawals played no part therein. Apparently the significance of the 'withdrawals' occurred to the [employer] for the first time in its brief to the Trial Examiner after the close of the hearing." The employer's belated effort to imbue this inartistically drawn telegram with significance which it does not possess injects into the proceedings an issue which does not exist.

2. The employer's asserted inability to distinguish between legitimate and discriminatory C. I. O. purposes

Taking for its text a statement which appears in the original charge filed in this proceeding alleging the discriminatory dismissal of the stewards and committeemen "because of their refusal to adhere to policies of Warehouse Union Local 1-6 I. L. W. U.," (R. I, 93), the employer contends that it was unable to determine whether the C. I. O.'s discharge demands were motivated by the refusal of the A. F. L. adherents to conform to C. I. O. policies or by the desire of the A. F. L. adherents to effect a change in bargaining representatives (Emp. Br., pp. 48–49, 106–107, 4, 25–27, 43, 44–46, 47, 54–55, 85–87, 93–94, 110–111, 120–123).

In considering this contention, it is necessary carefully to distinguish between the failure of employees to *conform* to valid rules of conduct required by the contracting union and the failure of employees to *agree* with the policies underlying those rules which leads them to take action to displace the contracting union. The desire of employees to change bargaining

representatives does not arise *in vacuo*. It is bottomed on disagreement with the incumbent concerning the way in which to promote and manage union policies. Those policies may relate to wage and hour issues, day-to-day administration of the collective bargaining agreement, attitudes towards racial issues, participation of unions in politics, or any of the manifold problems which are the concomitants of contemporary trade unionism. The genius of democratic institutions, of which trade unions are one aspect, rests on the interchange of ideas free from reprisal and their submission for decision to the electoral process. It is a meaningless contradiction in terms to grant employees the right to change representatives, but to deny them the right to disagree with the incumbent concerning the policies upon which an intelligent change must be predicated. The necessary concomitance of the two is obvious. "The freest of open advocacy of the divergent views of the voters," to which this Court gave eloquent expression in the *Local 2880* case (158 F. 2d. at 369), requires the freest of open advocacy upon meaningful issues. And in effectuating these views, the taking of action by employees to displace the contracting union may not, under the guise of failure to conform to the contracting union's rules, be made the subject of disciplinary measures.

We turn then to the record to evaluate the self-serving testimony of the employer's officials as to the information they had that the stewards, the committeemen, and the twenty eight additional employees

failed to conform to C. I. O. policies. In doing so, it is necessary to guard against the easy assumption that this information in fact beclouded the indisputable C. I. O. purpose of punishing employees for daring to oppose it. In contrast to the unwillingness of the employer's officials to testify that they knew the patent fact that the C. I. O. was abusing the closed-shop contract in order to suppress opposition to it, they were ready to testify that they knew of other facts which they were ostensibly unable to identify as inseparable from the C. I. O.'s suppressive purpose. This question of sheer fact has been correctly resolved against the employer by the Board's decision.

Taking the testimony of the employer's officials at face value and in its best light, they knew (1) that at scattered intervals over a period of at least a year prior to the suspension of the stewards, there had been some disagreement between the C. I. O. officials and the stewards concerning the administration of the contract and the manner in which certain individual grievances were to be processed, and that there had been some dispute between them concerning the implementation of the C. I. O.'s political action program and its nondiscriminatory racial policy (R. II, 561, 725–726, 763–768); (2) that in protest against the discharge of the stewards, the committeemen planned a work stoppage in contravention of the wartime no-strike pledge of organized labor (R. III, 725); (3) that the twenty-eight additional employees participated in the work stoppage (R. III, 677); and (4)

that the daily press reported that the work stoppage involved in part a dispute over the C. I. O.'s nondiscriminatory racial policy (R. II, 533, 562–563, R. III, 678, 702). This information did not obscure the C. I. O.'s purpose. Rather, it forcibly demonstrated its oppressive character.

Disagreement between the stewards and the C. I. O. officials extending over a year concerning union matters did not precipitate a request for discharge *until the stewards took steps to change the bargaining representative.* It was therefore not the fact of disagreement, but the fact of effective steps to implement it, which caused the suspension of the stewards. To assume that the employer's officials failed to recognize the plain import of this fact is to assume that they "lack capacity for making rational connections." [33]

As to the information that the committeemen planned a work stoppage to protest the discharge of the stewards, it appears that the employer's officials did not even know, during the morning of July 31, when the committeemen were ordered discharged by the C. I. O. because of their suspension, that a work stoppage was contemplated (R. II, 409–410; R. III, 673). Consequently, upon this occasion, the employer's officials could not have acted upon the assumption that the suspension of the committeemen was caused by the planning of a then unknown work stoppage. Without doubt the employer's officials learned of the planned work stoppage shortly thereafter, but the effect of this knowledge was dramatically to em-

[33] *Thomas* v. *Collins*, 323 U. S. 516, 535.

phasize to them the extent of the employees' revolt against the efforts of the C. I. O. to nip in the bud their movement to change representatives by striking at the leadership. It was plainly evident that if the C. I. O. were concerned with avoiding the work stoppage *qua* work stoppage the simple expedient would be to permit the reinstatement of the stewards who had done no more than exercise their legal right to seek a change of representatives.

As to the discharge of the *twenty-eight* additional employees one month after their participation in the work stoppage in which most of the *313* employees partook, their disparate selection for discharge could not for a moment have been attributed to a belated desire by the C. I. O. to vindicate a breach of the no-strike pledge which it had itself provoked. The employer's officials could not reasonably be presumed to have attributed the discharge of the twenty-eight additional employees to the C. I. O.'s interest in avoiding interruptions to war work when the C. I. O. itself had caused the permanent removal of thirty-seven employees and had unsuccessfully attempted the removal of seventy employees. Indeed, in refusing to accede to the C. I. O.'s request on August 30 to discharge the seventy employees, the employer's Labor Relations Director, Wood, himself stated to the C. I. O. official: "This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down" (*supra*, p. 18).

Finally, the racial issue, like the wage issue, whatever its merits, is but part of the fabric of issues which

forms the substantive basis for the desire of employees to change representatives. In short, unless complete lack of ordinary understanding upon the part of the employer's officials is assumed, they recognized of necessity that the so-called legitimate reasons for the requested discharge of the A. F. L. adherents were not the factors which induced the C. I. O.'s demands, and that the work stoppage dramatically revealed the deep rift between the employees and the C. I. O. officialdom. As this Court has held, "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N. L. R. B.*, 162 F. 2d 457, 460 (C. C. A. 9). The employer knew, in acceding to the C. I. O.'s discharge demands, that the "moving cause" was discriminatory.

In any event, assuming it can be said in this case that the employer was persuaded that the C. I. O. acted from both proper and improper motives in requesting the discharge of the A. F. L. adherents, the legal consequences are no different than if the employer knew, as is the fact, that the sole reason for the C. I. O.'s request was the rival unionism of the A. F. L. adherents. The necessity for this conclusion is apparent from a consideration of the practical impossibility of disentangling legitimate from illegitimate motives where both are concurrently operative in impelling a course of conduct, and determining whether one without the other would have been sufficient to induce the proscribed behavior. Unlawful motivation is nonetheless unlawful because accompanied by factors which by themselves would not fall under interdiction. It is not consonant with sound concepts of legal responsibility to leave the victims

of oppressive conduct without the statutory remedy because the wrongdoer has been sufficiently ingenious to adumbrate his illegal conduct with equivocal lawful considerations. The Second Circuit, confronted with this precise issue in the *American White Cross Laboratories* case, *supra,* succinctly concluded: "Nor is it pertinent that, to the company's knowledge, there were other grounds for the discharge request." 160 F. 2d, at 77–78. This accords with established practice.[34]

3. The employer's asserted confusion because the C. I. O. requested the discharge of many but not all A. F. L. adherents

The employer contends that it was unable to ascertain the C. I. O.'s purpose because there were other employees, apart from those whose discharges were requested, who were electioneering on behalf of the A. F. L. whom it is said the C. I. O. did not molest (Emp. Br., pp. 52–53). The employer chooses to forget that it itself blocked a clean sweep by refusing to accede to the C. I. O.'s request for the discharge of seventy employees on August 30. Nor is it exacting to infer, upon the discharge of better than ten percent of the working force for A. F. L.

[34] *N. L. R. B.* v. *Remington-Rand, Inc.*, 94 F. 2d 862, 872 (C. C. A. 2), cert. denied, 304 U. S. 576; *Butler Bros.* v. *N. L. R. B.*, 134 F. 2d 981, 985 (C. C. A. 7), cert. denied, 320 U. S. 789; *Kansas City Power & Light Co.* v. *N. L. R. B.*, 111 F. 2d 340, 349 (C. C. A. 8); *Cupples Co. Mfrs.* v. *N. L. R. B.*, 106 F. 2d 100, 117 (C. C. A. 8); *Matter of Lone Star Gas Co.*, 52 N. L. R. B. 1058, 1060; *Matter of United Dredging Co.*, 30 N. L. R. B. 739, 766, note 24; *Matter of Dow Chemical Co.*, 13 N. L. R. B. 993, 1023, enforced, 117 F. 2d 455 (C. C. A. 6); *Matter of Consumer's Research, Inc.*, 2 N. L. R. B. 57, 73; cf. *N. L. R. B.* v. *Gluek Brewing Co.*, 144 F. 2d 847, 857 (C. C. A. 8).

adherence, that the employer recognized mayhem for mayhem although the victim was only partially disfigured.[35]

III. The period during which the employees undertook their rival union activities was appropriate for a redetermination of bargaining representatives

Apart from the question of the employer's knowledge of the contracting union's discriminatory purpose, the *Rutland Court* doctrine requires that the employee's rival union activities, in order to be protected, must occur at a period during which it is appropriate to seek a redetermination of representatives. Upon this aspect of the case, there is no dispute as to the soundness of the Board's conclusion that the rival unionism of the A. F. L. adherents occurred during a protected period.

The Board found the closed-shop agreement (*supra*, p. 5) to have been validly entered into in conformity with the proviso to Section 8 (3) of the Act (R. I, 69). The Board concluded, however, that, by virtue of the indefinite term of the contract, the employees undertook to oust the C. I. O. as their bargaining representative at a period during which it was appropriate to seek a redetermination of representatives (R. I, 75, 54–55). As the Board succinctly stated, in directing the election to resolve the question of representation raised by the A. F. L. as a result of the rival union activity in this case: "Neither the

[35] Cf. *N. L. R. B.* v. *Luxury, Inc.*, 123 F. 2d 106, 108–109 (C. C. A. 2); *Triplex Screw Co.* v. *N. L. R. B.*, 117 F. 2d 858, 861 (C. C. A. 6); *N. L. R. B.* v. *Aladdin Industries, Inc.*, 125 F. 2d 377, 384 (C. C. A. 7), cert. denied, 316 U. S. 706.

original nor supplemental contracts contain a definite termination date. In view of its indefinite duration and the fact that it has been in force for at least 1 year, we find that the contract and extensions thereof, do not constitute a bar to a determination of representatives" (R. III, 802, 799–805, R. II, 552).

Underlying the Board's conclusion is the Board's well-settled rule concerning the length of time during which a union is immune from challenge by virtue of a collective bargaining agreement for an indefinite term. In determining whether a validly existing agreement between an employer and a union precludes an election for the purpose of resolving a disputed question of representation, the Board balances the interest in industrial stability, resulting from affording a period of quiet enjoyment to an agreement arrived at through collective bargaining, with the need of affording to employees reasonable intervals at which they may oust or reaffirm their bargaining representatives.[36] In making that equation, it is the Board's settled practice, with certain refinements irrelevant to the instant case,[37] not to disturb a contract of reasonable duration containing a definite termination date until the approach of the expiration of the contract term.[38] Where, as here, the collective bargaining agreement runs for an indefinite period, the Board's rule at the time this case was decided required that the union's immunity from

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[36] National Labor Relations Board, Twelfth Annual Report (Gov't Print. Off. 1948), p. 9.

[37] Id., at pp. 9–14.

[38] Id., at p. 9.

challenge end after the contract has been in effect for one year,[39] and thereafter whenever a question concerning representation arises an election for the purpose of resolving it is timely.[40] When, in the instant case, the A. F. L. adherents undertook activities looking toward the displacement of the C. I. O. as their bargaining representative, their rival unionism occurred more than four years after execution of the contract (*supra,* pp. 5–6) and therefor, during a time when it was appropriate to seek a change of representatives. As this Court has held, the employer could not knowingly during such a period, at the behest of the incumbent, invoke the closed-shop agreement to place under a pall "The freest of open advocacy of the divergent views of the voters."[41] Whether the employees are ultimately successful through their electioneering in effecting a change is immaterial, since the very object of a protected period is to afford employees freedom from discrimination whether in victory or defeat. Uncoerced resort to the franchise cannot depend on success in its exercise.

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[39] Recently, "in the interest of promoting greater stability in industrial relations," the Board has extended to two years the period of immunity "accorded to long-term contracts and contracts of indefinite duration." *Matter of Puritan Ice Co.*, 74 N. L. R. B. 1311, 1313–1314; *Matter of Fitrol Corp.*, 74 N. L. R. B. 1307; Twelfth Annual Report, *supra*, at p. 10.

[40] National Labor Relations Board, Eleventh Annual Report (Gov't Print. Off. 1947), p. 14; cf. Twelfth Annual Report, *supra*, p. 10.

[41] *Local No. 2880* v. *N. L. R. B.*, 158 F. 2d 365, 369.

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IV. The Board's construction of the closed-shop agreement is consistent with California local law, and in any event federal law is paramount to local law

The employer urges the impropriety of the Board's order upon the ground that California local law imposes upon the employer an absolute duty to abide by the terms of a closed-shop agreement to which it is a party, and that, upon failure to perform, the employer may be required specifically to perform or to answer in damages (Emp. Br., pp. 76–78). Since the Board's decision prevents performance of a closed-shop agreement where its purpose is to stifle rival unionism at an appropriate period, the argument is that the employer is subjected to the inconsistent mandates of state and federal forums. The contention was made to and implicitly rejected by this Court in the *Local 2880* case (Br. of Local 2880, pp. 24, 68).

At the outset it should be observed that the California Supreme Court takes no such inflexible view of the closed-shop agreement as is ascribed to it. It holds that a closed-shop agreement may not be utilized to cause the termination of a worker's employment for non-membership in a labor union where membership in the union is not open to him upon reasonable terms. *Marinship Corp.* v. *James,* 25 Cal. 2d 721, 155 Pac. 2d 329; *Williams* v. *International Brotherhood of Boilermakers,* 27 Cal. 2d 586, 165 Pac. 2d 903; *Bautista* v. *Jones,* 25 Cal. 2d 746, 155 Pac. 2d 343. In the *Williams* case, *supra,* the Court stated, "The individual worker denied the right to keep his job suffers a loss, and his right to protection against arbitrary and discriminatory exclusion should be

recognized wherever membership is a necessary prerequisite to work" (27 Cal. 2d at 591, 165 Pac. 2d at 906). In order to show that its decision was in harmony with the National Labor Relations Act, the Court cited the Board's decision in *Matter of Rutland Court Owners, Inc.,* 44 N. L. R. B. 587, the very case which established the rationale which this Court approved in the *Local 2880* case, and which is the foundation of the instant proceeding (27 Cal. 2d at 592, 165 Pac. 2d at 906). The California Supreme Court went on to say that an employer may be enjoined from enforcing its closed-shop agreement where performance would subject the employees to discriminatory treatment (27 Cal. 2d at 594, 165 Pac. 2d at 907). Accordingly, rather than lending support to the employer's contention, California local law substantially subscribes to the interpretation of the obligations imposed by a closed-shop agreement as expressed in the *Local 2880* case.

Moreover, assuming that California local law commands conduct inconsistent with that required by the National Labor Relations Act, there is little clearer than that local law must yield to federal law where the two cannot stand together. *Hamilton* v. *N. L. R. B.,* 160 F. 2d 465, 471 (C. C. A. 6); *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767; *Hill* v. *Florida,* 325 U. S. 538; *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 123; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218; *Rice* v. *Board of Trade,* 331 U. S. 247. In *Hill* v. *Florida,* 325 U. S. 538, 542, the Supreme Court ad-

verted with approval to an instance when the Board rejected an employer's defense of its refusal to bargain based on the union's failure to comply with the Florida local law requiring the licensing of a bargaining representative. There the Supreme Court stated: "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.'" In support of its conclusion, the Supreme Court cited its decision in *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, where at p. 123, in language dispositive of the employer's contention, it had stated:

> The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.,* Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 2–4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, "in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law." *Jerome* v. *United States,* 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

V. The Board's decision and order do not violate the due process clause of the Fifth Amendment

The employer contends that the Board's order is in contravention of the Fifth Amendment to the Federal Constitution in that it impairs the obligations of a contract and requires the reinstatement with back pay of the discharged employees without due process of law (Emp. Br., pp. 11, 57, 84). It is late in the day to make that argument. "The Board's order does not violate the Fifth Amendment * * *. In the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *N. L. R. B.* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employees." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 347. See also *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 187; *N. L. R. B.* v. *Star Publishing Co.,* 97 F. 2d 465, 471 (C. C. A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a),

in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such

person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant provisions of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. I, sec. 141, *et seq.*), are as follows:

* * * * *

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representa-

tive of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a

unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employed as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an

officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

"[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the

enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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